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(b)(1) Unless a person elects, within 30 calendar days after receipt of a notice under paragraph (a) of this section, to have paragraph (c) of this section apply with respect to the civil penalty under paragraph (a), the Secretary will assess the penalty, by order, after providing an opportunity for an agency hearing under 5 U.S.C. 554, before an administrative law judge appointed under 5 U.S.C. 3105, and making a determination of violation on the record. Such assessment order will include the administrative law judge's findings and the basis for such assessment.

(2) Any person against whom the Secretary assesses a penalty under this paragraph may, within 60 calendar days after the date of the order assessing such penalty, initiate action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with 5 U.S.C. chapter 7. The court will have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the order of the Secretary, or the court may remand the proceeding to the Secretary for such further action as the court may direct.

(c)(1) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Secretary will promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (a) of this section of the proposed penalty.

(2) If the person has not paid the civil penalty within 60 calendar days after the assessment has been made under paragraph (c)(1) of this section, the Secretary will institute an action in the appropriate District Court of the United States for an order affirming the assessment of the civil penalty. The court will have authority to review de novo the law and the facts involved and jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(3) Any election to have this paragraph apply can only be revoked with the consent of the Secretary.

(d) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (b) of this section, or

after the appropriate District Court has entered final judgment in favor of the Secretary under paragraph (c) of this section, the Secretary will institute an action to recover the amount of such penalty in any appropriate District Court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment will not be subject to review.

(e)(1) In accordance with the provisions of sections 333(d)(5)(A) and 345 of the Act and notwithstanding the provisions of title 28, United States Code, or Section 502(c) of the Department of Energy Organization Act, the General Counsel of the Department of Energy (or any attorney or attorneys within DOE designated by the Secretary) will represent the Secretary, and will supervise, conduct, and argue any civil litigation to which paragraph (c) of this section applies (including any related collection action under paragraph (d) of this section) in a court of the United States or in any other court, except the Supreme Court of the United States. However, the Secretary or the General Counsel will consult with the Attorney General concerning such litigation and the Attorney General will provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(2) In accordance with the provisions of sections 333(d)(5)(B) and 345 of the Act, and subject to the provisions of Section 502(c) of the Department of Energy Organization Act, the Secretary will be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this section, except to the extent provided in paragraph (e)(1) of this section.

(3) In accordance with the provisions of Section 333(d)(5)(c) and 345 of the Act, Section 402(d) of the Department of Energy Organization Act will not apply with respect to the function of the Secretary under this section.

APPENDIX A TO SUBPART U OF PART 431—SAMPLING PLAN FOR ENFORCEMENT TESTING OF ELECTRIC MOTORS

Step 1. The first sample size (n_1) must be five or more units.

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Step 2. Compute the mean (\bar{X}_1) of the measured energy performance of the n_1 units in the first sample as follows:

$$\bar{X}_1 = \frac{1}{n_1} \sum_{i=1}^{n_1} X_i \quad (1)$$

where X_i is the measured full-load efficiency of unit i .

Step 3. Compute the sample standard deviation (S_1) of the measured full-load efficiency of the n_1 units in the first sample as follows:

$$S_1 = \sqrt{\frac{\sum_{i=1}^{n_1} (X_i - \bar{X}_1)^2}{n_1 - 1}} \quad (2)$$

Step 4. Compute the standard error ($SE(\bar{X}_1)$) of the mean full-load efficiency of the first sample as follows:

$$SE(\bar{X}_1) = \frac{S_1}{\sqrt{n_1}} \quad (3)$$

Step 5. Compute the lower control limit (LCL_1) for the mean of the first sample using RE as the desired mean as follows:

$$LCL_1 = RE - tSE(\bar{X}_1) \quad (4)$$

where: RE is the applicable EPCA nominal full-load efficiency when the test is to determine compliance with the applicable statutory standard, or is the labeled nominal full-load efficiency when the test is to determine compliance with the labeled efficiency value, and t is the 2.5th percentile of a t -distribution for a sample size of n_1 , which yields a 97.5 percent confidence level for a one-tailed t -test.

Step 6. Compare the mean of the first sample (\bar{X}_1) with the lower control limit (LCL_1) to determine one of the following:

(i) If the mean of the first sample is below the lower control limit, then the basic model is in non-compliance and testing is at an end.

(ii) If the mean is equal to or greater than the lower control limit, no final determination of compliance or non-compliance can be made; proceed to Step 7.

Step 7. Determine the recommended sample size (n) as follows:

$$n = \left\lceil \frac{tS_1(120 - 0.2RE)}{RE(20 - 0.2RE)} \right\rceil^2 \quad (5)$$

where S_1 , RE and t have the values used in Steps 3 and 5, respectively. The factor

$$\frac{120 - 0.2RE}{RE(20 - 0.2RE)}$$

is based on a 20 percent tolerance in the total power loss at full-load and fixed output power.

Given the value of n , determine one of the following:

(i) If the value of n is less than or equal to n_1 and if the mean energy efficiency of the first sample (\bar{X}_1) is equal to or greater than the lower control limit (LCL_1), the basic model is in compliance and testing is at an end.

(ii) If the value of n is greater than n_1 , the basic model is in non-compliance. The size of a second sample n_2 is determined to be the smallest integer equal to or greater than the difference $n - n_1$. If the value of n_2 so calculated is greater than $20 - n_1$, set n_2 equal to $20 - n_1$.

Step 8. Compute the combined (\bar{X}_2) mean of the measured energy performance of the n_1 and n_2 units of the combined first and second samples as follows:

$$\bar{X}_2 = \frac{1}{n_1 + n_2} \sum_{i=1}^{n_1 + n_2} X_i \quad (6)$$

Step 9. Compute the standard error ($SE(\bar{X}_2)$) of the mean full-load efficiency of the n_1 and n_2 units in the combined first and second samples as follows:

$$SE(\bar{X}_2) = \frac{S_1}{\sqrt{n_1 + n_2}} \quad (7)$$

(Note that S_1 is the value obtained above in Step 3.)

Step 10. Set the lower control limit (LCL_2) to,

$$LCL_2 = RE - tSE(\bar{X}_2) \quad (8) \sqrt{b^2 - 4ac}$$

where t has the value obtained in Step 5, and compare the combined sample mean (\bar{X}_2) to the lower control limit (LCL_2) to find one of the following:

(i) If the mean of the combined sample (\bar{X}_2) is less than the lower control limit (LCL_2), the basic model is in non-compliance and testing is at an end.

(ii) If the mean of the combined sample (\bar{X}_2) is equal to or greater than the lower control limit (LCL_2), the basic model is in compliance and testing is at an end.

MANUFACTURER-OPTION TESTING

If a determination of non-compliance is made in Steps 6, 7 or 10, of this appendix A, the manufacturer may request that additional testing be conducted, in accordance with the following procedures.

Step A. The manufacturer requests that an additional number, n_3 , of units be tested, with n_3 chosen such that $n_1 + n_2 + n_3$ does not exceed 20.

Step B. Compute the mean full-load efficiency, standard error, and lower control

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limit of the new combined sample in accordance with the procedures prescribed in Steps 8, 9, and 10, of this appendix A.

Step C. Compare the mean performance of the new combined sample to the lower control limit (LCL_2) to determine one of the following:

(a) If the new combined sample mean is equal to or greater than the lower control limit, the basic model is in compliance and testing is at an end.

(b) If the new combined sample mean is less than the lower control limit and the value of $n_1 + n_2 + n_3$ is less than 20, the manufacturer may request that additional units be tested. The total of all units tested may not exceed 20. Steps A, B, and C are then repeated.

(c) Otherwise, the basic model is determined to be in non-compliance.

Subpart V—General Provisions

SOURCE: 69 FR 61941, Oct. 21, 2004, unless otherwise noted. Redesignated at 70 FR 60417, Oct. 18, 2005.

§431.401 Petitions for waiver, and applications for interim waiver, of test procedure.

(a) *General criteria.* (1) Any interested person may submit a petition to waive for a particular basic model any requirements of §§431.16, 431.76, 431.86, 431.96, and 431.106 of this part, upon the grounds that either the basic model contains one or more design characteristics which prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

(2) Any person who has submitted a Petition for Waiver as provided in this subpart, may also file an Application for Interim Waiver of the applicable test procedure requirements.

(b) *Submission, content, and publication.* (1) A Petition for Waiver shall be submitted either electronically to AS_Waiver_Requests@ee.doe.gov or by mail, in triplicate, to U.S. Department of Energy, Building Technologies Program, Test Procedure Waiver, 1000 Independence Avenue, SW., Mailstop EE-2J, Washington, DC 20585-0121. Each Petition for Waiver shall:

(i) Identify the particular basic model(s) for which a waiver is requested, the design characteristic(s) constituting the grounds for the petition, and the specific requirements sought to be waived, and must discuss in detail the need for the requested waiver;

(ii) Identify manufacturers of all other basic models marketed in the United States and known to the petitioner to incorporate similar design characteristic(s);

(iii) Include any alternate test procedures known to the petitioner to evaluate the characteristics of the basic model in a manner representative of its energy consumption; and

(iv) Be signed by you or by an authorized representative. In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a Petition for Waiver or in supporting documentation must be accompanied by a copy of the petition, application or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the FEDERAL REGISTER the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11 and will solicit comments, data and information with respect to the determination of the petition.

(2) You must submit any Application for Interim Waiver in triplicate, with the required three copies of the Petition for Waiver, to the Assistant Secretary for Energy Efficiency and Renewable Energy, U.S. Department of Energy. Each Application for Interim Waiver must reference the Petition for Waiver by identifying the particular basic model(s) for which you seek a waiver and temporary exception. Each Application for Interim Waiver must demonstrate likely success of the Petition for Waiver and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver. You or an authorized representative must sign the Application for Interim Waiver.

(c) *Notification to other manufacturers.* (1) After filing a Petition for Waiver